STATE OF MINNESOTA

IN SUPREME COURT

A20-0089

Original Jurisdiction — Per Curiam

In re Petition for Disciplinary Action
Against Samuel A. McCloud, a Minnesota
Attorney, Registration No. 0069693.

Filed: February 24, 2021
Office of Appellate Courts

Susan M. Humiston, Director, Nicole S. Frank, Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Samuel A. McCloud, Cambridge, Minnesota, pro se.

S Y L L A B U S

1. The record supports the referee's findings of fact and conclusions of law that respondent violated the Minnesota Rules of Professional Conduct by instructing a client not to attend a criminal pretrial hearing without legal justification and failing to communicate with the court or attend hearings.

2. To the extent that the referee relied on the fact that respondent's misconduct occurred during probation as both a violation of the Minnesota Rules of Professional Conduct and as an aggravating factor to increase respondent's recommended discipline, the referee clearly erred.

3. Given the aggravating factors present, a 60-day suspension is the appropriate discipline for respondent after he instructed his client not to attend a criminal pretrial hearing with no legal justification, failed to request a continuance or otherwise communicate with the court regarding his planned absences from a pretrial hearing and a hearing designated as a trial date, and failed to attend these hearings.

Suspended.

O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Samuel A. McCloud. We appointed a referee and, after holding an evidentiary hearing, the referee concluded that McCloud committed professional misconduct by instructing his client P.G. not to attend a pretrial hearing regarding his felony criminal charge, failing to request a continuance or otherwise communicate with the court regarding his planned absences from two hearings, and failing to appear at these hearings. The referee recommended a 60-day suspension with the requirement that McCloud petition for reinstatement under Rule 18 of the Rules on Lawyers Professional Responsibility ("RLPR"). McCloud challenges certain of the referee's factual findings and legal conclusions. He also urges us to reject the referee's recommended discipline. After review of the record, we conclude that, with the exception of one legal conclusion, the referee did not clearly err. We further conclude that the appropriate discipline for McCloud's misconduct is a 60-day suspension, with reinstatement by affidavit under Rule 18(f), RLPR.

FACTS

McCloud was admitted to practice law in 1977 and has practiced mainly in the area of criminal defense. McCloud's 40-year legal career includes numerous disciplinary violations. McCloud has received eight admonitions, two of which involved failure to appear at court hearings in 1986 and 2005, has been subject to a private probation, and has been publicly reprimanded. In addition, we indefinitely suspended McCloud in 2013 for his federal tax evasion conviction,[1] *In re McCloud*, 826 N.W.2d 529, 529 (Minn. 2013) (order), and we reinstated him in 2015 subject to a 5-year probation period, *In re McCloud*, No. A13-1381, Order at 2–3 (Minn. filed Feb. 3, 2015). McCloud was on this disciplinary probation when he committed the conduct underlying the current matter.

This petition for discipline arises out of McCloud's representation of a criminal defendant, P.G., from 2018 to 2019.[2] The State charged P.G. with two counts of issuing a dishonored check over $500. P.G.'s alleged victim also sued P.G. in a civil action. The prosecutor agreed to a continuance for dismissal of the criminal case if P.G. settled with the victim in the civil suit. Accordingly, McCloud began working with the victim's attorney to negotiate a settlement.

---

[1] We indefinitely suspended McCloud for a minimum of 2 years, effective as of July 5, 2011, which was the date that he began serving his prison sentence. *McCloud*, 826 N.W.2d at 529.

[2] McCloud disputes several of the referee's factual findings regarding his representation of P.G. Because we conclude that the referee's findings are not clearly erroneous, we restate the facts as found by the referee.

McCloud made his first appearance in the criminal matter on May 10, 2018. At this hearing, McCloud received notice of a pretrial hearing scheduled for December 4, 2018. On November 30, 2018, the prosecutor moved for a continuance of the December 4 pretrial hearing. The district court denied the motion on December 3.

McCloud and P.G. did not appear at the December 4 pretrial hearing. The district court rescheduled the hearing for March 29, 2019, and mailed McCloud a notice of the new date. The notice stated "You are expected to appear fully prepared." McCloud also received notice of an April 8, 2019, trial date.

The prosecutor e-mailed McCloud and the victim's attorney multiple times in March 2019, asking for updates on the status of settlement discussions in the civil case. McCloud responded on March 22, stating they were still working on the settlement.

McCloud called the prosecutor's office on March 28, 2019, spoke to an assistant, and asked for a continuance of the March 29 pretrial hearing. The prosecutor told her assistant that she did not object but that McCloud would need to contact the court directly. The prosecutor's assistant relayed this message to McCloud.

McCloud failed to contact the district court directly and failed to appear at the March 29 pretrial hearing. He also instructed P.G. not to appear. The prosecutor informed the court that McCloud had called her the day before and the parties were close to a settlement of the civil case. The prosecutor relayed McCloud's request that the April 8 trial date remain only as a status hearing because McCloud did not anticipate going to trial. The prosecutor also informed the court that she would not prepare for trial. The court responded, "I know."

Immediately after the March 29 hearing, the prosecutor e-mailed McCloud and the victim's attorney, stating that the district court was keeping the case on for trial on April 8. She asked that the settlement papers be sent to her by the next Tuesday. McCloud responded the same day, "I apologize. I did not realize that I would have to make contact with the Court. We will get it done." Also on March 29, the court's law clerk e-mailed all parties who had trials scheduled for the week of April 8, including McCloud and the prosecutor. The end of this e-mail stated:

> [The prosecutor] indicated [McCloud] was contacting the court. No such communication has been received and [neither McCloud] nor his client were present at pre-trial. As such, per [the district court], and as discussed on record, this matter remains on for trial beginning 4/8/19. [The prosecutor's] comments to the court are noted.

McCloud received the e-mail but did not respond. The law clerk sent a similar e-mail on April 4; again, McCloud received the e-mail but did not respond.[3]

McCloud failed to appear on April 8. P.G. arrived alone and tried to talk to the prosecutor, but the prosecutor declined to speak with him because he was a represented party. McCloud called the prosecutor shortly before the hearing and advised that they needed more time to finalize the settlement and that he could be available by phone if needed.[4]

---

[3] At the disciplinary hearing, McCloud testified that he thought these were generic e-mails that meant nothing. He further testified that he needs verbal confirmation that something will be accomplished at a hearing before he feels that he needs to appear.

[4] McCloud testified at the disciplinary hearing that he would have told P.G. not to attend on April 8 if he had been able to contact him in time.

The prosecutor relayed McCloud's message to the district court. The court expressed relief to see P.G. in court on April 8, and stated that she would have issued a warrant for his arrest if he failed to appear.

The district court did issue an order to show cause, requiring McCloud to explain his failure to appear on March 29 and April 8. The hearing to show cause was scheduled for April 24.[5] McCloud requested to appear by phone because he lives 3 hours from the court. The court denied the request, indicating that McCloud needed to appear in person so that the judge could assess his credibility.

At the hearing to show cause, McCloud explained that he relied on the prosecutor to relay information to the court. He said that he failed to appear because the settlement in the civil case was not finalized and it is a 3-hour drive to the courthouse. From the bench, the district court sanctioned McCloud and ordered him to pay $2,000. Later in the hearing, the court accepted the continuance for dismissal of P.G.'s criminal charges. And after the hearing, the court rescinded the verbal sanction in a written contempt order. The order was submitted as a complaint to the Office of Lawyers Professional Responsibility.

We then referred the matter to a referee. After hearing testimony from the district court judge, the prosecutor, the prosecutor's assistant, and McCloud himself, the referee made factual findings consistent with the facts we describe above. The referee concluded

[5] The civil case between P.G. and the victim settled before the April 24 hearing.

that McCloud violated Minn. R. Prof. Conduct 1.1,[6] 3.4(c),[7] and 8.4(d),[8] and the terms of his probation. The referee found that McCloud's failure to appear or communicate with the district court caused confusion and wasted judicial resources by requiring the district court judge to prepare for trial, confer with her mentor judge, and research appropriate sanctions. The referee found four aggravating factors and no mitigating factors. The referee recommended McCloud be indefinitely suspended with no right to petition for reinstatement for a minimum of 60 days and that he petition for reinstatement under Rule 18, RLPR.

ANALYSIS

McCloud disputes several of the referee's findings of fact, conclusions of law, and recommendations for discipline. Because McCloud requested a transcript of the hearing, the referee's findings and conclusions are not conclusive. Rule 14(e), RLPR. We "give great deference to the referee's findings and conclusions and will uphold them if they have evidentiary support in the record and are not clearly erroneous." *In re Paul*, 809 N.W.2d 693, 702 (Minn. 2012). A referee's findings and conclusions are clearly erroneous when

---

[6] Rule 1.1 of the Minnesota Rules of Professional Conduct states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

[7] Rule 3.4(c) of the Minnesota Rules of Professional Conduct states: "A lawyer shall not[] . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ."

[8] Rule 8.4(d) of the Minnesota Rules of Professional Conduct states: "It is professional misconduct for a lawyer to[] . . . engage in conduct that is prejudicial to the administration of justice . . . ."

they leave us "with the definite and firm conviction that a mistake has been made." *In re Albrecht*, 779 N.W.2d 530, 535 (Minn. 2010) (citation omitted) (internal quotation marks omitted).

I.

We begin by addressing McCloud's argument that the referee's findings of fact are clearly erroneous. First, McCloud disputes the referee's finding that he did not contact the court after failing to attend the December 4 hearing. McCloud states that he was never told about the denial of the prosecutor's continuance motion. Our review of the record confirms the referee's finding. At the disciplinary hearing, McCloud himself testified that he did not contact the court after the December 4 hearing. Moreover, McCloud is not truly disputing the referee's finding of fact; he is merely providing an explanation for why he failed to appear. This factual finding is therefore not clearly erroneous.

Second, McCloud objects to the referee's finding that he did not communicate with the district court regarding the March 29 or April 8 hearings. McCloud claims that he did so through the prosecutor. But McCloud admits that he failed to *directly* communicate with the court. Accordingly, we cannot conclude that the referee's finding is clearly erroneous.

Third, McCloud disputes the referee's finding regarding the harm caused by his misconduct. McCloud claims that the district court's waste of judicial resources was "of the Court's own making." The referee, however, found the district court judge credible when she testified that she spent time in chambers assessing the status of the case, preparing for trial, and researching sanctions. We are particularly deferential to the referee "when

the referee's findings rest on . . . or in part on credibility, demeanor, and sincerity." *In re Jones*, 834 N.W.2d 671, 677 (Minn. 2013) (citation omitted) (internal quotation marks omitted). McCloud has not pointed to anything in the record that would contradict the referee's finding on the judge's credibility. The referee therefore did not clearly err.

II.

Having concluded that the referee's factual findings are not clearly erroneous, we now address McCloud's arguments regarding the referee's conclusions of law. We review the interpretation of the Minnesota Rules of Professional Conduct de novo and the application of the rules to the facts for clear error. *In re Ulanowski*, 800 N.W.2d 785, 793 (Minn. 2011). The Director has the burden to prove a violation of the rules by clear and convincing evidence. *In re Grigsby*, 764 N.W.2d 54, 60 (Minn. 2009).

McCloud challenges the referee's conclusion that he violated Minn. R. Prof. Conduct 1.1. This challenge is meritless. Rule 1.1 requires lawyers to "provide competent representation" to clients. Minn. R. Prof. Conduct 1.1. Competence, in turn, "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.* By instructing P.G. to not attend the pretrial hearing in his felony criminal case, McCloud exposed P.G. to a potential bench warrant and criminal charges. *See* Minn. Stat. § 588.20, subd. 2(4) (2020) (addressing criminal contempt); *State v. Mohs*, 743 N.W.2d 607, 611 (Minn. 2008) (affirming constitutionality of bench warrants issued by district court judges with personal knowledge of defendants' failure to appear); *State v. Tayari-Garrett*, 841 N.W.2d 644, 654 (Minn. App. 2014) (affirming conviction for criminal contempt for disobeying a court order to appear for trial), *rev. denied* (Minn.

Mar. 26, 2014). McCloud testified that he did not advise P.G. of these potential consequences, and in fact, that these consequences did not even occur to him. We conclude that McCloud violated Minn. R. Prof. Conduct 1.1 by instructing P.G. not to appear at his March 29 pretrial hearing without advising P.G. of these potential consequences.[9]

We also agree with the referee that McCloud violated Minn. R. Prof. Conduct 1.1, by failing to either attend the March 29 and April 8 hearings or communicate with the district court regarding his planned absences. Rule 1.1's requirement that attorneys provide competent representation, at a minimum, mandates attendance at hearings or direct communication with the court regarding planned absences from those hearings. *See, e.g.*, *In re Adams Powell*, 901 N.W.2d 646, 646 (Minn. 2017) (order) (imposing discipline for failure to attend court hearing, in violation of Minn. R. Prof. Conduct 1.1). Indeed, McCloud admitted that he did not even know what happened at these hearings until he ordered the transcripts. We therefore conclude that McCloud violated Rule 1.1 by failing to appear or communicate.

Next, McCloud challenges the referee's conclusion that he violated Minn. R. Prof. Conduct 3.4(c). This rule forbids "knowingly disobey[ing] an obligation under the rules of a tribunal." Minn. R. Prof. Conduct 3.4(c). The term "knowingly" denotes "actual knowledge of the fact in question." Minn. R. Prof. Conduct 1.0(g). McCloud's assertion

---

[9] The referee concluded that this instruction also violated Minn. R. Prof. Conduct 3.4(c). McCloud did not expressly argue before us that this conclusion was clearly erroneous, and in the Director's brief to our court, the Director did not cite Rule 3.4(c) when discussing McCloud's instruction to P.G. Accordingly, we do not consider whether this instruction also violated Rule 3.4(c).

that he did not know of his obligation to appear or communicate is unfounded. In his March 29 e-mail, McCloud stated: "I apologize. *I did not realize that I would have to make contact with the Court.* We will get it done." (emphasis added). The referee found that this e-mail evinced McCloud's knowledge of the April 8 trial date itself. And this e-mail clearly establishes that McCloud knew of his obligation to communicate with the court regarding the April 8 date. The record also indicates that McCloud had actual knowledge of his obligation to appear on March 29. McCloud testified that he received the hearing notice, which states: "You are expected to appear fully prepared." McCloud therefore violated Rule 3.4(c) by knowingly failing to appear or communicate with the court regarding the March 29 and April 8 hearings.

Finally, McCloud challenges the referee's conclusion that he violated Rule 8.4(d). This rule prohibits conduct "prejudicial to the administration of justice." Minn. R. Prof. Conduct 8.4(d). We have recognized that attorneys who fail to attend hearings violate Rule 8.4(d). *See, e.g.*, *Adams Powell*, 901 N.W.2d at 646; *In re Tayari-Garrett*, 866 N.W.2d 513, 517 (Minn. 2015); *In re Greenman*, 860 N.W.2d 368, 374 (Minn. 2015). Thus, the referee did not clearly err in concluding that McCloud violated Rule 8.4(d) by failing to communicate with the district court or attend the March 29 and April 8 hearings.

We turn now to the referee's final legal conclusion. The referee concluded that McCloud violated Minn. R. Prof. Conduct 3.4(c) and 8.4(d) by violating his probation terms because one of those terms required him to adhere to the Minnesota Rules of Professional Conduct. The referee, however, also cited McCloud's misconduct while on probation as an aggravating factor.

We do not "double count" an attorney's conduct as both a violation of the Minnesota Rules of Professional Conduct and as an aggravating factor. *In re Sea*, 932 N.W.2d 28, 37 (Minn. 2019); *see also Tayari-Garrett*, 866 N.W.2d at 520 n.4 ("As a matter of fairness, we question whether the intentional nature of an attorney's misconduct can be an aggravating factor when the rules of professional conduct at issue require proof of intent."); *In re Jones*, 834 N.W.2d 671, 680 n.9 (Minn. 2013) (clarifying "that referees may not rely on the *same* acts of noncooperation to support both a finding of attorney misconduct and the existence of an aggravating factor" (citation omitted) (internal quotation marks omitted)). To the extent that the referee relied on the fact that McCloud's misconduct occurred during his probation as both a violation of the Minnesota Rules of Professional Conduct and as an aggravating factor to increase McCloud's recommended discipline, the referee clearly erred.[10] We will consider the fact that McCloud was on probation when he committed the misconduct as an aggravating factor but not as a separate violation of the rules of professional conduct.

III.

We now turn to the appropriate discipline for McCloud. The referee recommends, and the Director agrees, that we indefinitely suspend McCloud for a minimum of 60 days with the requirement that he petition for reinstatement under Rule 18, RLPR. McCloud

[10] Our conclusion regarding double counting is limited to the situation where an attorney violates the term of probation requiring the attorney to abide by the Minnesota Rules of Professional Conduct.

contends that this recommendation is excessive and asks us to impose sanctions that do not involve suspension.

We give "great weight" to the referee's recommendation but ultimately maintain responsibility for determining the appropriate sanction. *Greenman*, 860 N.W.2d at 376. In determining the appropriate sanction, we examine four factors: (1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession. *Id.* We also consider aggravating and mitigating factors. *Id.* And finally, while we consider similar cases, the discipline is tailored to the specific facts of each case. *Id.* Ultimately, the goal of discipline is "not to punish the attorney, but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Albrecht*, 779 N.W.2d 530, 540 (Minn. 2010) (citation omitted) (internal quotation marks omitted).

A.

We first consider the nature of McCloud's misconduct. McCloud failed to appear for a pretrial hearing and a hearing designated as a trial. He did not communicate with the district court directly and instead relied solely on opposing counsel, an attorney whose interests are not aligned with those of McCloud's client, to relay information to the court on his behalf. Lastly, he advised his client not to show up for a pretrial hearing and would have told him not to attend the trial if he had been able to contact him in time. McCloud admits that he did not consider that his advice could have gotten his client arrested and criminally charged.

We have regularly imposed sanctions for failing to attend court hearings. *See Adams Powell*, 901 N.W.2d at 646; *Greenman*, 860 N.W.2d at 371; *In re Nathanson*, 812 N.W.2d 70, 76 (Minn. 2012). And we have disciplined lawyers for failing to communicate with the district court. *Cf. In re Moore*, 692 N.W.2d 446, 448 (Minn. 2005) (imposing discipline for, inter alia, failing to communicate with a district court). Instructing a client to ignore a court order is also significant. *See Paul*, 809 N.W.2d at 704 (referring to attorney's misconduct, that included instructing a client not to attend child a support hearing, as "substantial"). The nature of McCloud's misconduct therefore warrants discipline.

B.

Turning next to the cumulative weight of McCloud's disciplinary violations, we distinguish "a brief lapse of judgment or a single, isolated incident of misconduct from multiple instances of misconduct occurring over a substantial amount of time." *Greenman*, 860 N.W.2d at 377 (citation omitted) (internal quotation marks omitted). In this case, McCloud's misconduct took place over only the course of 2 months and involved a single client matter.[11] On its own, this factor does not weigh heavily against McCloud.

C.

We next address the harm to the public and to the legal profession. The Director did not provide evidence that the public at large or McCloud's client, P.G., were adversely impacted by his misconduct. McCloud's misconduct, however, harmed the legal

[11] The referee considered only McCloud's failure to appear in March and April 2019; McCloud's failure to appear in December 2018 was not included.

profession. His failure to communicate with the district court or attend scheduled court hearings caused confusion and wasted judicial resources by forcing the district court judge to spend time assessing the status of the case, preparing for trial, and researching disciplinary sanctions. This factor tilts toward serious discipline.

D.

Having considered the four factors, we now turn to the existence of any aggravating or mitigating factors. The referee found four aggravating factors: (1) McCloud was on probation during the alleged misconduct; (2) McCloud has a significant disciplinary history; (3) McCloud has over 40 years of legal experience in criminal law; and (4) McCloud presented no evidence that he would not engage in the same misconduct in the future. The referee found no mitigating factors. The Director agrees with the referee's conclusions; McCloud disputes several findings related to aggravating and mitigating factors.

As previously stated, the first aggravating factor found by the referee is clearly correct: misconduct during probation is an aggravating factor. *In re Kurzman*, 871 N.W.2d 753, 758 (Minn. 2015). McCloud was on probation through 2020, *In re McCloud*, No. A13-1381, Order at 2-3 (Minn. filed Feb. 3, 2015), and the misconduct occurred in early 2019.

We also agree that McCloud's disciplinary history is an aggravating factor. *See Sea*, 932 N.W2d at 37. Attorneys with a disciplinary history are expected to show a renewed commitment to ethical behavior. *Id.* McCloud has an extensive disciplinary history; he has previously been disciplined 11 times, including a lengthy suspension. And McCloud

was disciplined in 1986 and 2005 for the same type of misconduct he committed here, failure to appear at hearings. McCloud, however, tries to distinguish his 2005 admonition from his current misconduct because he realizes that he should have appeared in 2005, but maintains that he had no serious obligation to appear for the April 8 hearing. McCloud's argument is meritless. *See Tayari-Garrett*, 866 N.W.2d at 515 (discussing attorney being convicted of contempt of court for failing to appear at trial). Given the number of times that McCloud has previously been disciplined, and the fact that some of his prior discipline was for similar misconduct, we give considerable weight to this aggravating factor. *In re Hulstrand*, 910 N.W.2d 436, 444 (Minn. 2018) ("Prior disciplinary history weighs heavily if the prior discipline was for similar misconduct." (citation omitted) (internal quotation marks omitted)).

Further, an attorney's substantial experience practicing law is a valid aggravating factor. *See, e.g.*, *Sea*, 932 N.W.2d at 37 (considering attorney's substantial experience in criminal law as an aggravating factor). The referee's conclusion that McCloud's 40-year criminal law career is an aggravating factor is sound.[12]

---

[12] In a finding regarding McCloud's 40 years of experience practicing law, the referee noted McCloud's failure to appear had been an issue years before with a different judge. Aside from clarifying the county in which the prior incident occurred, McCloud does not challenge this reference. But he argues that the referee erred in refusing to admit evidence that McCloud offered to explain the prior incident.

McCloud attempted to argue the relevance of the prior incident on three separate occasions. Despite allowing the attorney for the Director to address that incident in her opening statement, the referee excluded McCloud's evidence on that same topic on relevance grounds and did not allow McCloud to argue relevance. McCloud included the proffered evidence in his addendum to his brief in our court. Specifically, he included documents related to an ethics complaint that had been filed about this prior incident. McCloud argues in his brief that evidence about the prior complaint was relevant because

The last aggravating factor found by the referee was McCloud's failure to demonstrate that he would not engage in similar misconduct in the future. We have recognized that an attorney's refusal to acknowledge the wrongful nature of his or her actions indicates a risk of future misconduct. *See Tayari-Garrett*, 866 N.W.2d at 520. McCloud testified repeatedly that he did nothing wrong. He did state that it would not be "difficult at all" to change his practices; however, the referee was not required to take this statement at face value. *See Jones*, 834 N.W.2d at 677 (noting that we are particularly deferential to the referee "when the referee's findings rest on . . . or in part on credibility, demeanor, and sincerity" (citation omitted) (internal quotation marks omitted)). In light of McCloud's testimony and his previous misconduct involving the failure to attend hearings

---

the Director declined to pursue discipline in that matter. Based on the Director's decision not to pursue discipline in the earlier matter, McCloud argues he believed that what he did here was appropriate. The Director moved to strike the materials in McCloud's addendum, as well as two sentences in his brief related to those materials. We deferred ruling on the Director's motion until we decided the merits. *In re McCloud*, No. A20-0089, Order at 1 (Minn. filed Oct. 14, 2020). We deny the motion to strike, but the additional materials, even if admitted, do not change our analysis.

Better practice might have been for the referee to admit the materials because the referee allowed the Director to base her opening argument on the same incident. But any error is harmless given the facts before us. McCloud has been disciplined twice for failing to appear at court hearings, as noted above. Additionally, he received a hearing notice that explicitly stated "You are expected to appear." The record is therefore clear that McCloud had actual knowledge of his obligation to appear on March 29, and McCloud's inclusion of the results of the prior investigation in his brief to our court does not change that fact. Accordingly, even if the referee erred in refusing to admit the evidence, an issue we do not reach, any error would be harmless in light of the undisputed facts in the record.

McCloud also claims that he was denied due process of law when the referee excluded this evidence. In his brief, McCloud merely presents a conclusory statement that his due process rights were violated; he provides no argument or citation to authority supporting this conclusion. We therefore deem this argument forfeited. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (concluding allegations in a brief unsupported by argument or citation to legal authority were forfeited).

in 1986 and 2005, it was not clearly erroneous for the referee to conclude that McCloud had not provided any assurances that he would not engage in similar future misconduct.

Finally, the referee determined that there were no mitigating factors. McCloud asserts that there are five. We disagree.

McCloud argues that we should consider as a mitigating factor the fact that his conduct is consistent with his 40-year criminal law career. But our precedent clearly states that McCloud's extensive career in criminal law is actually an aggravating factor, not a mitigating one. *See Sea*, 932 N.W.2d at 37. The second and fourth reasons listed by McCloud—essentially his ignorance of the district court's continuance policy—are not valid mitigating factors. The third purportedly mitigating factor is the fact that the Director declined to pursue discipline for similar prior misconduct. We disagree for reasons explained above, *supra* note 12. And the fifth factor listed by McCloud—the lack of harm to the public and to P.G.—is already one of the four factors we considered above and is not a separate mitigating factor. *In re Bonner*, 896 N.W.2d 98, 110 (Minn. 2017) (concluding that lack of harm to clients "should not be counted as a mitigating factor because these considerations overlap with our consideration of the harm that [the attorney's] misconduct caused to the public and the legal profession"). We therefore conclude that the referee did not clearly err when he found no mitigating factors.

E.

We now turn to similar cases. McCloud states that we have discretion to fashion discipline appropriate to the facts of this case and urges us not to suspend him. In response, the Director cites numerous cases to support the referee's recommended discipline.

While the 60-day suspension period recommended by the referee is not out of line with our previous cases, the cases cited by the Director are readily distinguishable. *See Adams Powell*, 901 N.W.2d at 646 (45-day suspension for misconduct involving failure to attend a court hearing); *Greenman*, 860 N.W.2d at 371 (6-month suspension for numerous instances of misconduct, one of which was the failure to attend court hearings and conferences); *Nathanson*, 812 N.W.2d at 76 (90-day suspension for multiple instances of misconduct, one of which was the failure to appear for a hearing); *Tayari-Garrett*, 866 N.W.2d at 515 (120-day suspension for failing to appear for a trial date and lying to the court regarding absence); *In re Thomas*, 879 N.W.2d 659, 660 (Minn. 2016) (order) (60-day suspension for various misconduct which included the failure to attend a court hearing); *In re Fredin*, 552 N.W.2d 23, 23 (Minn. 1996) (order) (60-day suspension in part for failing to attend a court hearing). In each of these cases, the attorney's failure to attend a court hearing was but one of several instances of misconduct. And many of those cases dealt with misconduct involving the attorney's representation of multiple clients.

McCloud's misconduct in this case is unique. The misconduct at issue took place over only 2 months and did not harm the client or the public. Nonetheless, McCloud's misconduct was not victimless; it harmed the court by wasting judicial resources. McCloud furthermore has an extensive history of discipline spanning 40 years of legal practice and has twice been disciplined for the same type of misconduct. In light of these circumstances—and given McCloud's failure to provide assurances that he will not engage in similar misconduct in the future—the Director urges us to require that he petition for reinstatement under Rule 18, RLPR. We disagree.

Rule 18(f), RLPR, states that "[u]nless otherwise ordered by this Court," a petition for reinstatement is not required when a lawyer "ha[s] been suspended for a fixed period of ninety (90) days or less." For suspensions of 60 days, the Director acknowledges that we have required a suspended attorney to petition under Rule 18 only once. *See In re Gurstel*, 540 N.W.2d 838, 843 (Minn. 1995). The attorney in *Gurstel* failed to timely file state and federal taxes, owing in excess of $300,000 on the federal tax liability. *Id.* at 840. In addressing Gurstel's argument that a petition for reinstatement was not required under RLPR 18(f), we simply stated that "[w]e agree[d] with the referee's recommendation in this case." *Id.* at 843.

We later distinguished *Gurstel*, noting it was "unusual" and "an outlier." *Kurzman*, 871 N.W.2d at 759. Like McCloud, Kurzman was on probation at the time of his misconduct and had been disciplined numerous (10) times. *Id.* at 757. We concluded that Kurzman's misconduct, which involved multiple acts of misconduct in two client matters and included a suggestion, without a good faith basis, that a deponent had been accused of sexual misconduct with a minor, was "qualitative[ly] differen[t]" than Gurstel's misconduct. *Id.* at 754–55, 759–60. The same is true here and, thus, a petition for reinstatement is not necessary.

Rather than *Gurstel*, a more apposite case is *Moore*, 692 N.W.2d at 448. In *Moore*, the attorney "did not attend a hearing she scheduled for a client, failed to inform the court she would not attend, did not attempt to obtain a continuance, advised her client that he need not appear, and failed to apprise her client of the potential consequences of not attending." *Id.* Like this case, the attorney excused her behavior by arguing that, "in her

experience, judges in Ramsey County 'don't care' whether lawyers appear in court." *Id.* at 449. She had been previously disciplined three times, and one of those times was for identical misconduct. *Id.* at 450. Much like McCloud, Moore also continued to claim that "she did nothing unethical at any time." *Id.* Moore was publicly reprimanded and placed on probation for 2 years. *Id.*

But even *Moore* is distinguishable from the current case. McCloud was on probation during his misconduct, he has a more extensive history of discipline than Moore, he has previously been disciplined more times for the same type of misconduct, and the underlying case here is criminal while the case in *Moore* was civil. *Id.* at 448. The consequences of a criminal defendant's failure to attend a hearing could be far more severe than a civil litigant's failure to appear. Because of these distinctions, we agree that McCloud's misconduct warrants more than a public reprimand. We therefore conclude that the appropriate discipline is a 60-day suspension, with reinstatement by affidavit under Rule 18(f), RLPR. But, because McCloud was on probation when he committed this misconduct, we conclude that McCloud must continue on probation for a period of 2 years following reinstatement.

Accordingly, we order that:

1. Respondent Samuel A. McCloud is suspended from the practice of law for a minimum of 60 days, effective 14 days from the date of this opinion.

2. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals), and shall pay $900 in costs, *see* Rule 24(a), RLPR.

3. Respondent shall be eligible for reinstatement to the practice of law following the expiration of the suspension period provided that, not less than 15 days before the end of the suspension period, respondent files with the Clerk of the Appellate Courts and serves upon the Director an affidavit establishing that he is current in continuing legal education requirements, has complied with Rules 4 and 26, RLPR, and has complied with any other conditions for reinstatement imposed by the court.

4. Within 1 year of the filing of this order, respondent shall file with the Clerk of Appellate Courts and serve upon the Director proof of successful completion of the professional responsibility portion of the state bar examination. Failure to timely file the required documentation shall result in automatic re-suspension, as provided in Rule 18(e)(3), RLPR.

5. Upon reinstatement to the practice of law, respondent shall be placed on probation for 2 years, upon the following terms and conditions:

a. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall respond to the Director's correspondence by its due date. Respondent shall provide the Director with a current mailing address and shall immediately notify the Director of any change of address. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct that may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

b. Respondent shall abide by the Minnesota Rules of Professional Conduct.

c. Respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director to monitor compliance with the terms of this probation. Within 2 weeks of the date of the order reinstating respondent to the practice of law, respondent shall provide to the Director the names of four attorneys who have agreed to be nominated as respondent's supervisor. If, after diligent effort, respondent is unable to locate a supervisor acceptable to the Director, the Director will seek to appoint a supervisor. Until a supervisor has signed a consent to supervise, the respondent shall, on the first day of each month, provide the Director with an inventory of active client files described in paragraph d. below. Respondent shall make active client files available to the Director on request.

d. Respondent shall cooperate fully with the supervisor in his/her efforts to monitor compliance with this probation. Respondent shall contact the supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall submit to the supervisor an inventory of all active client files by the first day of each month during the probation. With respect to each active file, the inventory shall disclose the client name, type of representation, date opened, most recent activity, next anticipated action, and next court appearance date. Respondent's supervisor shall file written reports with the Director at least quarterly, or at such more frequent intervals as may reasonably be requested by the Director.

e. Respondent shall initiate and maintain office procedures that ensure that there are prompt responses to correspondence, telephone calls, and other important communications from clients, courts, and other persons interested in matters that respondent is handling, and that will ensure that respondent regularly reviews each and every file and completes legal matters on a timely basis.

f. Within 30 days of the date of the order reinstating respondent to the practice of law, respondent shall provide to the Director and to the probation supervisor, if any, a written plan outlining office procedures designed to ensure that respondent is in compliance with the probation requirements. Respondent shall provide progress reports as requested.